

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.263 OF 2005

Dinkar Vasudev Shinde ... Petitioner

Vs.

Lilachand H. Rathod ... Respondents

Mr. P.J. Shinde for the petitioner.

Mr. J.S. Kini for the respondent.

CORAM: SMT. RANJANA DESAI, J.

DATED: 25TH APRIL, 2005.

P.C.:-

1. In this petition, the petitioner who is defendant-tenant has challenged the concurrent finding of fact recorded by both the courts below that he is a defaulter. The decree was passed by the trial court on the ground that the plaintiff had proved that the defendant is in arrears of rent for more than six months and he is willful defaulter in payment of rent. That decree has been confirmed by the lower appellate court.

2. I have heard Mr. Shinde, the learned counsel appearing for the petitioner. He contended that the trial court had not framed issue as regards the validity of the notice. This was pointed out to the lower appellate court. However, the lower appellate court has rejected this submission on the ground that there are no

pleadings to that effect. He submitted that this is factually incorrect because in the written statement in paragraph 12, the defendant has said that the notice of demand contained untenable demand of payment of rent and possession. He submitted that the issue ought to have been framed and inasmuch as the issue has not been framed, the judgments of the courts below have become vulnerable. They suffer from patent illegalities and deserve to be set aside.

3. I am unable to agree with Mr. Shinde, the learned counsel appearing for the petitioner. In paragraph 12, defendant has said as under:

"With reference to para 9, the defendant received the notice dated 2.11.1998 of the plaintiff, however, since it contained untenable demand of payment of rent and possession, there was no question of complying with the same. The defendant by his reply dated 14.12.1998 has duly replied the said notice."

4. There is no specific contention that the notice of demand is invalid or illegal. The defendant's contention is that the demand made was untenable. This contention has been considered by both the courts and the concurrent unassailable finding of fact is returned that the defendant is a defaulter. Since, there are no specific

pleading as regards validity of the notice, the trial court cannot be faulted for not having framed the issue in that behalf. In view of this, the present petition cannot be entertained and is dismissed.

5. At this stage Mr. Shinde, the learned counsel appearing for the petitioner says that some time may be given to the petitioner to vacate the suit premises. In the facts and circumstances of the case, the petitioner is given eight months time to vacate the suit premises on the petitioner and all adult members of his family filing usual undertaking in this court within a period of four weeks from today to the effect that they will not sell, assign, transfer the suit premises or create any third party rights in the suit premises or induct any one in the suit premises and will hand over vacant, peaceful and unencumbered possession of the suit premises after expiry of eight months.

(SMT. RANJANA DESAI, J.)